



UNITED STATES MARINE CORPS

MARINE FORCES RESERVE
4400 DAUPHINE STREET
NEW ORLEANS, LOUISIANA 70146-5400

IN REPLY TO
4200
CMD

JUN 05 2006

FORCE POLICY LETTER 06-06

From: Commander, Marine Forces Reserve
To: Distribution List

Subj: CONTRACTING FOR SERVICES WITHIN MARINE FORCES RESERVE
(MFR) HEADQUARTERS

Encl: (1) MFR Counsel Memo
(2) Sample Format for Statement of Work format
(3) Sample Format for Request for Contractor Services

1. Purpose. This is the MFR policy on contracting for services for the MFR staff.

2. Background. Contractors, when properly used, provide a wide variety of useful services that play an important part in helping MFR to accomplish its mission. Outsourcing is a proper means to acquire special knowledge and skills not available in the government, obtain cost effective services, or obtain temporary or intermittent services within MFR Headquarters. MFR Regional Contracting Office (RCO) has put contract documents in place for the provision of those services.

3. The acquisition and administration of contractor services raises legal, fiscal, and resource concerns. Proper documentation of requirements for services and proper staffing of contract requests will ensure that contract services are the appropriate means to meet mission requirements.

4. Policy. In order to provide command awareness of contractor employees, to ensure the propriety of the duties such contractors perform, to comply with security requirements, and to properly plan for and execute the command budget, all contractor services at MFR Headquarters and Major Subordinate Commands (MSCs) Headquarters will be acquired through the MFR RCO after staffing as described herein.

a. Prior to initiating a request for contractor services, MFR Department Heads and MSCs Staffs shall review enclosure (1) to ensure their requests comply with the guidance and principles set forth herein. Using the format in enclosure (2), a statement of work describing the specific tasks to be performed and the deliverables to be produced by the contractor shall be prepared.

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b. The statement of work shall be routed to the MFR Counsel, RCO, Security Manager, and Comptroller for comments.

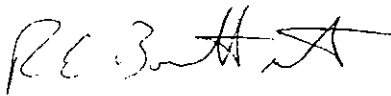
c. MFR Department Heads and MSCs shall prepare a request for the services using the format in enclosure (3). The request shall analyze and validate the requirement by examining the nature of the services, the duration of the requirement, the other available alternatives, and the cost. The analysis shall include a minimum of three alternatives-assigning the tasks to current personnel, issuing Active Duty Special Work orders, or utilizing reserve personnel to accomplish the tasks, and hiring a contractor. The validation shall include a long-term plan to meet any continuing requirement.

d. The request, statement of work, and the staffing comments shall then be forwarded to a standing Contracted Services Approval Board (CSAB) made up of the Comptroller, Counsel, MFR Chief of Staff (C/S), and such other members as the MFR C/S shall direct. The CSAB shall review the request and determine whether the requirement is valid, is best met with contractor services, and should be approved.

e. MFR Departments and MSCs with approved requests shall submit a Request for Procurement in the RCO database with appropriate line of accounting. RCO shall acquire the services.

5. This policy is effective immediately and applies to renewals of services at the end of a contract term which will coincide with the beginning of the next Fiscal Year.

6. This policy does apply to MFR Headquarters, and all MSCs.


R. E. BRAITHWAITE
Executive Director

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CL
1 May 06

MEMORANDUM

From: Counsel

Subj: USE OF CONTRACTOR EMPLOYEES AT MARFORRES

1. Contractors can provide a wide variety of useful services to assist MARFORRES in accomplishing its mission. There are, however, two significant potential legal pitfalls with the Government contracting for services: (a) contractors cannot perform inherently governmental functions and (b) contractor employees cannot provide personal services so as to appear to be government employees. In either case the practices creating the improper performance must be stopped or the contracts themselves must be terminated. The purpose of this memorandum is not to discourage use of contractors but to alert you to the potential problems that must be avoided.

2. **Inherently Governmental Functions.** The Federal Acquisition Regulations (FAR) define "inherently governmental function" as one that is so intimately related to the public interest as to mandate performance by Government employees. (FAR 7.501) It is clear, for example, that command of Marines cannot be contracted out but the provision of maintenance services may be. Inherently governmental services include activities that require either the exercise of discretion in applying Government authority or making value judgments in making decisions for the Government. Governmental functions normally fall into two categories: acts of governing (i.e. the discretionary exercise of Government authority) and monetary transactions and entitlements. FAR 7.503 lists a number of inherently governmental functions, to include determination of agency policy; determination of program priorities for budget requests; direction and control of Federal employees; determining what supplies and services are to be acquired by the Government; approving any contractual documents; determining whether contract costs are reasonable, allocable, and allowable; and the determination of budget policy, guidance and strategy.

3. The policy of the Executive Branch of the Federal Government is to ensure that Government action is taken as a result of informed, independent judgments made by Governmental officials who are ultimately accountable to the President. When MARFORRES uses service contracts, this policy is ensured by (a) prohibiting

Enclosure (1)

Subj: USE OF CONTRACTOR EMPLOYEES AT MARFORRES

the use of service contracts for performance of inherently governmental functions, (b) providing greater scrutiny and an appropriate enhanced degree of management oversight, (c) ensuring that any final agency action reflects the independent conclusions of agency officials and not those of contractors, and (d) ensuring that reasonable identification of contractor and contractor work products is made whenever there is a risk that persons outside Government might confuse them with Government officials or with Government work products.

4. **Personal Services Contract.** A personal services contract is one that makes the contractor appear to be a Government employee. FAR 37.101 indicates that a personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Marine Corps is not allowed to award personal services contracts unless specifically authorized by statute. The evil in such contracts is the circumvention of Federal civil service laws. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by civil service laws. Obtaining personal services by contract rather than by direct hire circumvents those laws unless Congress has authorized acquisition of those services by contract.

5. The touchstone of legality under the personnel laws is whether the contract creates what is tantamount to an employer-employee relationship between the Government and the employee of the contractor. Contract employees may have many characteristics of civil services employees, such as working at the Government site and using Government equipment. Employees are distinguished from independent contractors by the degree to which the Government actually supervises the manner and means by which the work is performed. It is therefore critical to heed both the contract's terms and the manner of the contract administration during performance to avoid a personal services contract.

6. One key to avoiding an improper contractual relationship from the start is for the statement of work (SOW) to clearly identify the tasks to be performed and the deliverables to be provided by the contractor. The SOW, not a Government supervisor, dictates the contract employee's work. It does this by identifying the tasks and deliverables on its face, so the contractor does not require continuous Governmental supervision.

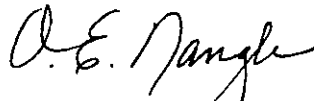
7. The second key is the manner of administration of the contract. FAR 37.104(c)(2) provides that each contract arrangement must be judged in the light of its own facts and circumstances, but the key questions will always be "Will the Government exercise relatively continuous supervision and control

Enclosure (1)

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over the contractor personnel performing the contract." The contractor, not the Government, should furnish the necessary management and personnel, and the contractor is responsible to supervise, control, and direct performance of its own employees in fulfilling the contract's requirements. Contractor employees should only be expected to do the work in the SOW. Any supervision that is provided by Government personnel should be infrequent.

8. Questions concerning these matters should be addressed to the undersigned at DSN 678-8016.


O. E. NANGLE

Enclosure (1)

SAMPLE FORMAT FOR STATEMENT OF WORK

Introduction: [Describe your intent]

Statement of Need: [Describe what your requirement is.]

Scope: [State the nature of the services to be provided]

Tasks: [Identify in a much detail as possible what the contractor is expected to do.]

Deliverables: [State what products do you expect the contractor to produce.]

Period of Performance: [State the period of the award. Cannot exceed one year.]

Place of Performance: [Where will the work be performed?]

Government Furnished Property and Equipment: [Office, computers, web access, data, etc]

Security: [Will contractor have access to classified information? If so, what clearance will be required]

Travel: [Will contractor have to travel to accomplish tasks?]

On-Site Task Manager: [Who will determine if contractor is present and performing as required?]

Enclosure (2)



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IN REPLY TO
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SAMPLE REQUEST FOR CONTRACTOR SERVICES

From: [_____]]
To: Commander, Marine Forces Reserve (Attn: Contractor Service Approval Board)

Subj: REQUEST FOR CONTRACTED SERVICES AT MFR [SECTION NAME]

Ref: (a) MFR Policy 4200 CMD of __ Dec 03

Encl: (1) Statement of Work
(2) Staff Routing Sheet/comments

1. As provided by reference (a), approval is requested to contract for the services described in enclosure (1) in the MFR [section name].

2. These services are required to [state the reason the services are needed or what would happen if the services are not approved.]

3. In making this request, I have validated this requirement by analyzing the following alternatives.

a. Assigning the tasks to current personnel. [Why is this option not available now. Is it available in the future?]

b. Utilizing Marines. Marines on ADSW orders or SMCR/IMA drilling reservists will not meet the requirement because [state reasons].

c. Contracting for services. Outsourcing this requirement will meet immediate needs, and there is available funding.

4. The anticipated duration of this requirement is [months, years, etc. If the requirement will persist more than this FY, state the long-term plan to meet the continuing requirement.]

5. Enclosure (1) has been routed to Counsel, RCO, Security Manager, and Comptroller and their comments are attached at enclosure (2).

SIGNATURE

Enclosure (3)